83-716

Office Supreme Court, U.S.
FILED
NOV 28 1983
ALEXANDER L. STEVAS,
CLERK

No. A-208
83-716

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

CAROLE JUNE CATON, Petitioner

vs.

PAUL WILLIAM CATON, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION

Thomas Dee Frasier
James E. Frasier

No. A-208

83-716

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

CAROLE JUNE CATON, Petitioner

vs.

PAUL WILLIAM CATON, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF OKLAHOMA

BRIEF OF RESPONDENT IN OPPOSITION

Thomas Dee Frasier
James E. Frasier

TABLE OF CONTENTS

	Page
Table of Authorities	1a
List of Parties	1
Statement of Jurisdiction	3
Statement of the Case	15
Summary of the Argument	20
Argument	22
Conclusion	43

TABLE OF AUTHORITIES

	Page
Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979)	32
Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977)	33
Califano v. Westcott, 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979)	32
Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1161, 22 L.Ed.2d 398 (1969)	9
Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S.Ct. 796, 39 L.Ed.2d 52 (1974)	38
Craig v. Boren, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976)	31,32
Forbes v. State Council, 216 U.S. 396, 30 S.Ct. 295 (1910)	11

Frontiero v. Richardson,
411 U.S. 677, 93 S.Ct. 1764,
36 L.Ed.2d 583 (1973) 30

Herndon v. State of Georgia,
295 U.S. 441, 55 S.Ct. 794,
79 L.Ed. 1530 (1934) 10

Illinois v. Gales,
___ U.S. ____, 103 S.Ct. 2317
(1983) 9,14

Kirchberg v. Feenstra,
450 U.S. 455, 101 S.Ct. 1195,
67 L.Ed.2d 428 (1981) 32

Lassiter v. Department of
Social Services,
452 U.S. 18, 101 S.Ct. 2153,
68 L.Ed.2d 640 (1981) 40

Lehr v. Robertson,
___ U.S. ____, 103 S.Ct. 2985
(1983) 33
39

Little v. Streator,
452 U.S. 1, 101 S.Ct. 2202,
68 L.Ed.2d 627 (1981) 35

Mathews v. Eldridge
424 U.S. 319, 96 S.Ct. 893,
47 L.Ed.2d 18 (1976) 35

McGoldrich v. Compagnie Generale,
309 U.S. 430, 60 S.Ct. 670,
84 L.Ed. 849 (1970) 9

Mississippi University for Women v. Hogan, ___ U.S. ___, 102 S.Ct. 3331 (1982) 33

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951) 23

Orr. v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979) 32

Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979) 26,33

Picard v. Connor, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) 9

Quilloin v. Walcott, 434 U.S. 246, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) 38

Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) 30

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955) 23

Rostker v. Goldberg,
453 U.S. 57, 101 S.Ct. 2646,
69 L.Ed.2d 478 (1981) 33

R.S. v. D.,
410 U.S. 614, 93 S.Ct. 1146,
35 L.Ed.2d 536 (1973) 42

Santosky v. Kramer,
___ U.S. ___, 102 S.Ct. 1388
(1982) 41

Smith v. Organization of
Foster Families,
431 U.S. 816, 97 S.Ct. 2094,
53 L.Ed.2d 14 (1977) 39

State of Missouri v. Gehner,
281 U.S. 313, 50 S.Ct. 326
(1930) 11

Street v. New York,
394 U.S. 576, 89 S.Ct. 1354,
22 L.Ed.2d 572 (1969) 8

Tacon v. Arizona,
410 U.S. 350, 93 S.Ct. 998
(1973) 9

Washington v. Davis,
426 U.S. 229, 96 S.Ct. 2040,
48 L.Ed.2d 597 26

Webb v. Webb,
451 U.S. 493, 101 S.Ct. 1889,
68 L.Ed.2d 392 (1981) 8,13

Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980) 32

Wisconsin v. Yoder, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972) 39

Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) 26

STATUTES

28 U.S.C. §2403 (b) 2,3

10 Okla. Stat. § 501 (1981) 12,16 25,27,42

20 Okla. Stat. § 30.1 (1981) 5

MISCELLANEOUS

United States Supreme Court Rules (1980), Rule 17.1 22

United States Supreme Court Rules (1980), Rule 21.1(h) 4

United States Supreme Court Rules (1980), Rule 34.1(b) 1

Wright, Federal Courts 541-542 (3d ed. 1976) 10

11011

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM

No. A-208

CAROLE JUNE CATON, Petitioner

vs.

PAUL WILLIAM CATON, Respondent

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF OKLAHOMA
BRIEF OF RESPONDENT IN OPPOSITION

LIST OF PARTIES

Pursuant to Rule 34.1(b), Rules of the Supreme Court of the United States (1980), requiring the listing of all parties to the proceeding in the court whose

judgment is sought to be reviewed, Respondent would respectfully state to the Court that the minor daughter, Adrianna Caton, is a party in interest to these proceedings and that an attorney has been appointed by the District Court of Tulsa County to represent her.

Petitioner, furthermore, has failed to comply with Rule 28.4(c) which requires that "(i)n any proceeding in this Court wherein the constitutionality of any statute of a State is drawn in question, and the State or any agency, officer, or employee thereof is not a party, the initial pleading, motion, or paper in this Court shall recite that 28 U.S.C. §2403(b) may be applicable and shall be served upon the Attorney General of the

State". The purpose of this provision, of course, is to allow the state whose statute is being questioned to have an opportunity to defend its constitutionality. "The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality." 28 U.S.C. §2403(b)

STATEMENT OF JURISDICTION

At the outset, it must be questioned whether this Court has jurisdiction to review the case of Caton v. Caton. Petitioner (Pet. for Cert. 2) invokes the authority of 28 U.S.C. 1257 which pro-

vides that final judgments of the highest court of a State may be reviewed by the Supreme Court by Writ of Certiorari "where any title, right, privilege or immunity is specially set up or claimed under the Constitution ... " Rule 21.1(h), however, requires the Petitioner to

> "specify the state in the proceedings, both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court; such pertinent quotation of specific portions of the record, or summary thereof ... as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on writ of certiorari."

Although Petitioner recites the stages of proceedings below (Pet. for Cert. p.3-4), she has completely failed to indicate when and how the federal questions she would have the Court consider were raised in the state courts. Issues presented on appeal to the Supreme Court of Oklahoma, like those considered by the trial court, were exclusively concerned with the interpretation of Oklahoma Statutes and case law and the application of state law to the facts of this case. No constitutional questions of any kind, state or federal, were presented. In accord with Oklahoma practice, 20 Okla. Stat. §30.1 (1981), the case was assigned by the Supreme Court to the Court of Appeals which issued an opinion

affirming the trial court's ruling, based in part on a misconception of the facts.

She then petitioned the Court of Appeals for a rehearing, again raising pure questions of statutory construction. The rehearing was granted, and resulted again in affirmance, albeit with a new opinion addressing the question of the child's legitimacy. No mention of any kind was made of the applicability of the Statute with respect to gender of the parent.

Once again she petitioned for a rehearing, now for the first time, however, raising the issue of equal protection. This allegation, based as it was on a forced reading of the Court's decision,

as will be discussed more fully below, was apparently rejected by the Court of Appeals out of hand in refusing to grant a second rehearing. In no way did the Court indicate that it agreed with Petitioner's characterization of the ruling as discriminatory, let alone pass on the constitutionality of the purported policy. Her Petition to the Supreme Court for a Writ of Certiorari, in which she again raised this spurious issue of discrimination, was similarly denied. Thus it is obvious that at no time did a state court even consider, let alone uphold, the constitutionality of the statute in question from attack on the basis of supposed sex discrimination.

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary". Webb v. Webb, 451 U.S. 493, 496, 101 S.Ct. 1889, 1891, 68 L.Ed.2d 392 (1981), quoting Street v. New York, 394 U.S. 576, 582, 89 S.Ct. 1354, 1360, 22 L.Ed.2d 572 (1969).

That being the case, there would not appear to be any basis for review by this Court.

> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system. 451 U.S. at 496-97, 101 S.Ct. at 1892.

The Court has recently reiterated that "it is only in exceptional cases,

and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below ..." Illinois v. Gates, ____ U.S. ___, 103 S.Ct. 2317, 2321 (1983), quoting McGoldrick v. Compagnie Generale, 309 U.S. 430, 435-36, 60 S.Ct. 670, 673, 84 L.Ed. 849 (1940). Cf. Tacon v. Arizona, 410 U.S. 350, 353, 93 S.Ct. 998, 999 (1973), ("We cannot decide issues raised for the first time here."); Picard v. Connor, 404 U.S. 270, 276, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971) ("We emphasize that the federal claim must be fairly presented to the state courts."); Cardinale v. Louisiana, 394 U.S. 437, 438, 89 S.Ct. 1161, 1162, 22 L.Ed.2d 398 (1969) ("It

was very early established that the Court will decide federal constitutional issues raised here for the first time on review of state court decisions.")

While it may be true that Petitioner did belatedly attempt to raise the issue of Equal Protection in her petition for rehearing addressed to the Court of Appeals, such was unavailing. "The long-established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it." Herndon v. State of Georgia, 295 U.S. 441, 443, 55 S.Ct. 794, 795, 79 L.Ed. 1530 (1934). See C. Wright, Federal Courts 541-542 (3d d. 1976). Cf., State

of Missouri v. Gehner, 281 U.S. 313, 320 520 S.Ct. 326, 327 (1930) ("Ordinarily, it will not consider contentions first made in a petition to the state court for rehearing where the petition is denied without more."); Forbes v. State Council, 216 U.S. 396, 397, 30 S.Ct. 295, 296 (1910) ("it must appear that such Federal question was in fact passed upon in considering the motion for rehearing; if not, the general rule applies.") To be sure, an exception to the general rule exists "if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." 295 U.S. at 444, 55 S.Ct. at 795. It can hardly be said, however, to have been

unanticipated that the Court would consider it "repugnant to the policy of Oklahoma and to social conscience to allow Appellant to use 10 O.S. 1981 §501 to illegitimize their daughter". (Pet. for Cert. 14) in view of the strong and long-standing public policy of Oklahoma that "a child born during marriage is legitimate ... " (Id at 15). Petitioner has mysteriously read into this an intent to discriminate against women "similarly situated", which fantasy could just as well have been entertained in anticipation of the ruling. Petitioner's second question presented, i.e., whether she has been denied due process was not raised, even remotely, at any stage of the proceedings including her second petition for rehear-

ing and her Petition for a Writ of Certiorari.

Although the issues of Equal Protection and Due Process, which the states are bound to respect, are important guarantees under our Constitution, the nature of the federal union and the proper role of the courts counsels caution in the review of state decisions. "Principles of comity in our federal system require that the state courts be afforded the opportunity to perform their duty, which includes responding to attacks on state authority based on the federal law ... " Webb v. Webb, 451 U.S. at 500, 101 S.Ct. at 1983.

> Apart from the reluctance with which every court should proceed to set aside legislation as uncon-

> stitutional on grounds not properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. Illinois v. Gates, ____ U.S. at ___ _, 103 S.Ct. at 2322.

It is for that reason that the Court "should apply this general principle with sufficient rigor to make reasonably certain that we entertain cases from state courts only where the record clearly shows that the federal issue has been properly raised below". 451 U.S. at 500, 101 S.Ct. at 1893. Such is not the case here. Although the record below is not devoid of references to one of the issues Petitioner would raise before this Court, that of equal protection, "when the state

court whose judgment is being reviewed has not addressed the federal question that is later presented here," the Court cannot be sufficiently sure "that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court." Id. at 502, 101 S.Ct. at 1894. It is respectfully submitted that no such confidence is possible in the case Petitioner would present and that accordingly the Court should decline to assert jurisdiction.

STATEMENT OF THE CASE

Petitioner, Carole June Lawson (formerly Caton) and Respondent, Paul William Caton, were married in December 1974. A child, Adrianna Vashti Caton, was born

four years later, in December, 1978. Petitioner led Respondent to believe that Adrianna was his daughter. As a result a strong bond of love and affection developed between the two. One year later, however, in January, 1980, Petitioner filed for divorce and shortly thereafter applied to the court for an order requiring Respondent to undergo blood tests, alleging that "Plaintiff knows that Defendant is not the natural father of said child, that blood tests will exclude Defendant from the possibility of being the natural father of said child ... " The court, pursuant to 10 Okla. Stat. §501 (1981), ordered the Respondent to undergo such tests. Respondent, however, refused to do so due to his belief that

it was "vulgar" to undermine family ties with blood tests. The court found that it was not in the interests of justice to hold him in contempt. A second order was subsequently issued and Respondent was held in indirect contempt. The trial court, however, declined either to enforce the order or to resolve the issue of paternity against him. Since Oklahoma law presumes that a child born during a marriage is legitimate, a presumption which can only be overcome with clear and convincing evidence, and since absent Respondent's blood tests Petitioner could not meet her burden of proof, Respondent was adjudged to be the father and visitation rights were granted and child support awarded accordingly. After failing

in her attempt to obtain a writ of mandamus from the Oklahoma Supreme Court ordering the trial court to enforce its orders on blood testing, Petitioner began the appeal process which has culminated in her Petition for a Writ of Certiorari in this Court.

Respondent does not deny paternity. On the contrary, he is desirous of maintaining the close ties of filiation which have extended now over a period of some five years. Furthermore, he is able and willing to pay the child support awarded. No purpose would be served by a finding of nonpaternity on Respondent's part other than to extinguish the close personal ties he has enjoyed with the child. A psychologist in the case has testified

that the child needs to have a continuing relationship with the Respondent, whom she has known as her father since birth and that to sever this bond would be traumatizing for the child.

Petitioner is now married to James Lawson, her former paramour, whom she alleges to be the natural father of the child. At the time the adulterous affair was in progress, Respondent considered James Lawson to be his best friend. The effect of declaring Respondent not to be the father of the minor child would, accordingly, be to stimatize the child, Adrianna, as the adulterous offspring of her mother's illicit affair with her step-father. The child would lose one father without gaining another. No loss of

custody by the mother or of contact with the stepfather, of course, is at issue.

It is the contention of the Respondent, as it was the ruling of all the courts in Oklahoma which considered the case, that it would not be in the best interests of the child to pursue the issue of biological paternity any further. It is this posture of repose which Petitioner would have the Court disturb.

SUMMARY OF THE ARGUMENT

This case is of interest only to the parties and is too unique to establish any general rules of law. The applicable statute is not facially discriminatory and the construction placed on it by the court below makes no statement about

gender. The court held only that the legislature had not intended the statute to be used to illegitimize a child born to a marriage.

The Equal Protection clause requires only an important state interest, not a compelling one, where gender is concerned. Men and women can hardly be similarly situated with respect to paternity in any event. Petitioner has no liberty or property interest to protect in the determination that Respondent is not the father of her child and has had all the process she is due. It is Respondent who has a strong liberty interest in the child he has loved as a daughter. The presumption that a child born during a marriage is legitimate serves to protect him in

his interests as well as preventing the child from being stigmatized as the product of an illicit relationship.

ARGUMENT

POINT ONE:

THIS IS NOT AN APPROPRIATE CASE FOR CERTIORARI.

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Rule 17.1. There are no special and important reasons for the Court to hear this case. It has been amply considered and fairly decided in the courts below. It does not resemble the criteria listed in Rule 17.1 as exemplary of cases meriting consideration.

As was pointed out in Statement of Jurisdiction, the state court of last resort in Oklahoma has not, in fact, decided any federal question at all in this case, let alone one in conflict with the decision of the high court of another state or of this court. This case is not one of public importance but is purely of interest to the parties. NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951). It is at most of purely scholarly interest beyond benefiting the litigants. Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 75 S.Ct. 614, 99 L.Ed. 897 (1955). It unncessarily raises constitutional issues which would best be avoided. Id.

In her initial Motion for Order Requiring Blood Tests, Petitioner stated frankly that she was "fully aware of the unique fact status involved in this case which is believed to be a case of first impression. The fact situation is one in which the natural mother seeks to have the husband found to be not the natural father of the child." Accordingly, no useful purpose would be served if the Court were to grant Petitioner's request. She has had her day in court and has lost as she deserves. Unhappily, having exhausted her remedies in Oklahoma, she seeks now to exhibit the spectacle of her sordid misconduct before the nation's highest court solely to deprive a young child of the love and affection of the

man she knows as her father. Clearly, this is not a case warranting the exercise of the Court's extraordinary and discretionary jurisdiction.

POINT TWO:

PETITIONER HAS NOT BEEN DENIED THE EQUAL PROTECTIONS OF THE LAW.

Petitioner, a former newspaper reporter proceeding pro se, has seriously misconstrued the teachings of this court on Equal Protection. She concedes (Pet. for Cert. 5) that the Statute in question, 10 Okla. Stat. § 501, "applies to any party." (emphasis in original) Accordingly, it is not discriminatory on its face, either with respect to gender or to any other classification.

If a Statute is facially nondiscriminatory it may be possible to demonstrate a pattern of discriminatory enforcement from which a discriminatory intent may be inferred. Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886). The Court can readily appreciate, however, the difficulty Petitioner wil have in proving a pattern of discrimination on the basis of one admittedly unique case. Even where a neutral law has a disproportionate impact, more is needed to demonstrate a discriminatory purpose. Personnel Administrator of Mass v. Feeney, 442 U.S. 256, 261, 99 S.Ct. 2282, 2286, 60 L.Ed.2d 870 (1979), citing Washington v. Davis, 426 U.S. 229, 2380-44, 99 S.Ct. 2040, 2046-50, 48 L.Ed.2d 597.

Petitioner, apparently, would find the discriminatory intent in the interpretative gloss put on the Statute by the Court of Appeals. A fair reading of the decision will not sustain this contention. The court agreed with Respondent that "it would be repugnant to the policy of Oklahoma and to social conscience to allow Appellant to use 10 O.S. 1981 § 501 to illegitimize their daughter." (Pet. for Cert. 14) (emphasis added). The Court spoke only to the issue of one particular man in one particular case; it made no generalization on gender. On the contrary, the Court indicated that the presumption of legitimacy "reflects a strong public policy of Oklahoma." (Id. at 15) Obviously, this policy would just

as much be frustrated by a husband proving his own nonpaternity as by the wife, as here, attempting to do so. The Court gave absolutely no indication whatsoever that it would view the matter differently were the husband the instigator. Granted, the Court, in determing the intent of the legislature, spoke of allowing "accused men an opportunity to present evidence of non-paternity so they may avoid having to pay support for children they have not fathered." (Id. at 16) It went on to say, however, that another purpose "is to obtain support for minor children from their natural parents." Ordinarily, this will work to the benefit of the mother. Hence the two balance out.

Of course, in the vast majority of cases the child is born out of wedlock. The effect of proving nonpaternity will not be to "illegitimize" the child since it is already illegitimate. A child is illegitimized by proof of nonpaternity only in the rare case that a man choses to acknowledge a child allegedly born of an adulterous relationship by an unfaithful wife. Yet Petitioner maintains that "(t)he use of the Act by a man would also illegitimize a child if nonpaternity were proven, and should be equally socially repugnant. However, the Oklahoma Court of Appeals held that such use by a man was proper." (Pet. for Cert. 6) It held, of course, no such thing.

Even if the Court of Appeals had held that men could illegitimize and women not, Petitioner would not have carried her burden of proof. She labors under the misapprehension that Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971) and Frontiero v. Richardson, 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973) stand for the proposition "that discrimination based upon sex constituted invidious discrimination and could not stand absent a compelling state reason." (Pet. for Cert. 6) (emphasis added) As is well known, Reed was decided under a minimum scrutiny rationale, albeit somewhat heightened. In Frontiero a plurality did hold that classifications based upon sex are inherently suspect and thus

must be subjected to strict judicial scrutiny, which would, of course, require the elusive "compelling" state interest. This view has never been endorsed by the majority and is not the standard of review currently in force.

The definitive standard finally endorsed by the Court was set forth in the leading case of Craig v. Boren, 429 U.S. 190, 198, 97 S.Ct. 451, 457, 50 L.Ed. 2d 397 (1976). "To withstand constitutional challenge ... classifications by gender must serve important governmental objections and must be substantially related to achievement of those objectives." (emphasis added) In contrast to the "compelling" interests standard, under which defeat of the classification is

virtually a foregone conclusion, government interests which are merely "important" can more easily be shown to justify the challenged legislation.

Cases since Craig v. Boren have demonstrated the flexibility of this standard. Laws have been struck down as violative of equal protection in Orr v. Orr, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed. 2d 306 (1970) (alimony payments); Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1970) (adoption of unwed children); Califano v. Westcott, 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979) (unemployment of mothers); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980) (widower benefits); Kirchberg v.

Feenstra, 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981) (control of property); Mississippi University for Women v. Hogan, _____ U.S. _____ 102 S.Ct. 3331 (1983) (admittance policies). By contrast, laws have been upheld against charges of gender discrimination in Califano v. Webster, 430 U.S. 313, 97 S.Ct. 1192, 51 L.Ed.2d 360 (1977) (old-age insurance); Personnel Administrator of Mass., 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed. 2d 870 (1979) (veteran's preference); Rostker v. Goldberg, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981) (draft registration); Lehr v. Robertson, _____ U.S. ____ , 103 S.Ct. 2985 (1983) (adoption of unwed children).

This brings us to the strange notion that the Oklahoma statute discriminates between a male attempting to prove non-paternity by means of blood tests, "while denying blood tests to a similarly situated female attempting to prove nonpaternity". (Pet. for Cert., Questions Presented) Granted, the relationship between a man and his paternity, may be similar to that between a woman and her maternity. Also, a man may be similarly situated with respect to a woman's maternity, as the latter is to be the former's paternity, by way of reciprocal analogy. Petitioner's contention, however, that a woman can be similarly situated to a man's paternity, or lack thereof, as he is himself is virtually self-satirical in

its absurdity. There is obviously no comparison between a man's nonpaternity. Just how different the situation is can be seen by analyzing Petitioner's claim that she has been denied due process.

POINT THREE:

PETITIONER HAS NOT BEEN DENIED DUE PROCESS OF LAW

Petitioner invites our attention to the case of Little v. Streater, 452 U.S. 1, 101 S.Ct. 2202, 68 L.Ed.2d 627 (1981) (Pet. for Cert. 7). In that case the Court held that it was unconstitutional to require an indigent male to pay for blood test to prove he was not the father of the child. Following Mathews v. Eldridge, 424 U.S. 319, 335, 96 S.Ct. 893, 903 47 L.Ed.2d 18 (1976), the Court noted that the putative father's private

interests were substantial. There was first of all the property interest which the defendant had at stake in terms of the claim for child support. Id. at 14, 101, S.Ct. at 2209. Second, there was his liberty interest in not being incarcerated for noncompliance. Id. What, by contrast, does Petitioner allege as her "private interest"? It is, so she tells us, "having the filiation of her child correctly ascribed to her present husband, rather than to her former husband ... " (Pet. for Cert. 7) She cites no authority for this remarkable proposition. How is she adversely affected by the false ascription of paternity? She will not have to pay undeserved child support if she fails to prove not her

own, but her former husband's nonpaternity. On the contrary, she has an interest in continuing those payments. Nor will she go to jail for nonpayment. No liberty interest there, either. True, Little does speak of a liberty interest in the absence of a parent-child relationship, but that is an interest unique to the male seeking to avoid "familial bonds" being imposed upon himself, id., not an interest in extinguishing those bonds which others freely embrace, as Petitioner is attempting to do. Conceivably the child's stepfather, if he is in fact the natural father, might have some interest in exercising exclusive paternity, but then Petitioner would have no standing to assert her husband's claim.

On the other hand, the Respondent has a very compelling liberty interest in maintaining the relationship which the Petitioner herself was responsible for allowing to develop. A man, after all, has a perfect right to expect that the child born to his wife will be his own.

The Court "has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment", Cleveland Board of Education v. LaFleur, 414 U.S. 632, 639-40, 94 S.Ct. 796, 39 L.Ed.2d 52 (1974), and that "the relationship between parent and child is constitutionally protected". Quilloin v. Walcott, 434 U.S. 246, 255-56, 98 S.Ct.

549, 554, 54 L.Ed.2d 511 (1978). "(T)he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children as well as from the fact of blood relationship". Lehr v. Robertson, _____ U.S. _____, 103 S.Ct. 2985 (1983), (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 844, 97 S.Ct. 2094, 2109-2110, 53 L.Ed.2d 14 (1977) and Wisconsin v. Yoder, 406 U.S. 205, 231-33, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972). Clearly, then, Respondent has a constitutionally protected liberty right

in the "emotional attachments" he has, entirely through the actions of Petitioner, developed toward the minor child, quite aside from any "blood relationship".

The effect of enforcing the order for blood tests, if nonpaternity is proven, would be the same as extinguishing the rights of a natural parent who is judged unfit. "It is hardly surprising that this forced dissolution of the parent-child relationship has been recognized as a punitive sanction by courts, Congress, and commentators." Lassiter v. Department of Social Services, 452 U.S. 1839-40, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) (dissenting). "Before a State may sever completely and irrevocably the rights of

parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence". Santosky v. Kramer, ___ U.S. ____, 102 S.Ct. 1388, 1391 (1982) The same logic should hold where the rights of a parent are severed upon the allegation that he is not the natural parent. The presumption which Petitioner complains of (Pet. for Cert. 8) does no more than protect the Respondent's right to his child. It is he who should be heard to complain of a lack of due process.

Petitioner has already had all the process she was due. She requested that the Court order Respondent to take the blood tests, and he refused. She hardly

has standing to demand that he be punished for contempt since she has no private stake in his incarceration. R.S. v. D., 410 U.S. 614, 618, 93 S.Ct. 1146, 1149, 35 L.Ed.2d 536 (1973). She cites no authority to the effect that a private litigant is entitled to a default judgment as a matter of law, even if the Oklahoma Statute made that option available to the trial court. 10 Okla. Stat. § 501 (1981) She says only that "(i)t would be simple for the trial court to declare petitioner's present husband the legal father". (Pet. for Cert. 9) She does not explain how the Due Process can be read to mandate such simplicity.

Finally, we may consider Petitioner's statement that, by attributing paternity

to her present husband (id) "the child would not be illegitimized, rather she would be correctly legitimized to her natural father". She was not so concerned with legitimacy, however, as to refrain from her nonpaternity action until after her divorce was granted and she had remarried. Even if she were now to take the name of her present stepfather, she would be branded before the world as the bastard daughter of an adultress, and deprived of the love and companionship of a father as well. It is respectfully submitted that nothing in the Due Process clause of the Constitution requires so inequitable a result.

CONCLUSION

The Respondent, Paul William Caton, requests that this Court deny the Petition for Writ of Certiorari and let stand the decision in the Court of Appeals below on the grounds that nothing in the laws of Oklahoma bearing on this case violates any clause of the Constitution of the United States.

Respectfully submitted,

Thomas Dee Frazier

I hereby certify that on the 25th day November 1983 three copies of the foregoing instrument was mailed to Carol June Lawson Route 2, Box 85c Haskell, Okla. 74436

Thomas Dee Frazier

CERTIFICATE OF SERVICE

I, the undersigned, Thomas Dee Frasier, of lawful age being first duly sworn, upon my oath state: That 40 copies of the above and foregoing Respondent's Brief in Opposition to Petition for Writ of Certiorari were duly deposited in the United States mail, first class postage prepaid, at Tulsa, Oklahoma, this 25th day of Nov. 1983, and within the time allowed for filing and pursuant to Rule 28 of the Rules of the Supreme Court properly addressed as follows:

Clerk of the Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Respectfully submitted,
FRASIER, FRASIER & GULLEKSON

By: Thomas Dee Frasier

THOMAS DEE FRASIER
717 S. Houston, Suite 400
P. O. Box 799
Tulsa, Oklahoma 74101
(918) 584-4724